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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAVID RASMUSSEN, an individual, on behalf of himself and all others similarly situated,

Plaintiff,

v.

TESLA, INC. d/b/a TESLA MOTORS, INC., a Delaware corporation,

Defendant.

Case No. 5:19-cv-04596-BLF

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PLAINTIFF SERVICE AWARD

Date: June 16, 2022
Time: 9:00 a.m.
Judge: Hon. Beth Labson Freeman
Courtroom: 3

NOTICE OF MOTION AND MOTION[1]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 16, 2022, at 9:00 a.m. at 280 South 1st Street, 5th Floor, Courtroom 3, San Jose, CA 95113, Plaintiff and Class Counsel Lieff Cabraser Heimann & Bernstein, LLP ("LCHB") and the Law Offices of Edward C. Chen ("Chen") will and hereby do move the Court pursuant to Fed. R. Civ. P. 23(h) for an order awarding (i) attorneys' fees to Class Counsel in the amount of $373,377.79; (ii) reimbursement of litigation expenses of $36,622.21; and (iii) a Service Award of $1,000 for Plaintiff David Rasmussen. As set forth in the supporting memorandum, the requested awards are fair, reasonable, and justified.

This motion is brought pursuant to the Court's December 9, 2021 Preliminary Approval Order (Dkt. 54), paragraphs III.A, IV.H.3, and V.A–B of the Settlement, and Fed. R. Civ. P. 23(h). The motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the March 31, 2022 Declaration of Robert J. Nelson filed concurrently herewith; the March 31, 2022 Declaration of David Rasmussen filed concurrently herewith; the July 28, 2021 Declaration of Edward C. Chen, filed in support of preliminary approval of the Settlement (Dkt. 49-3); the July 28, 2021 Declaration of Sean P. Gates, filed in support of preliminary approval of the Settlement (Dkt. 49-4); the arguments of counsel; all papers and records on file in this matter; and such other matters as the Court may consider.[2]

[1] Capitalized terms in this notice and the supporting memorandum have the same meanings as in the Stipulation of Settlement (the "Settlement"). Dkt. 49-2, Ex. 1.

[2] Pursuant to paragraph VI.A and Exhibit D of the Settlement, a proposed order addressing the relief requested in this motion will be submitted with Plaintiff's forthcoming Motion for Final Approval.

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Plaintiff,

v.

TESLA, INC. d/b/a TESLA MOTORS, INC., a Delaware corporation,

Defendant.

Case No. 5:19-cv-04596-BLF

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PLAINTIFF SERVICE AWARD

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class Counsel secured a Settlement Fund of $1,500,000—from which a $625 payment will be made for each Class Vehicle—to settle Plaintiff's claims regarding Tesla's temporary limitation of maximum battery voltage in 1,743 Model S sedans ("Class Vehicles"). This amount is many times the prorated value of the temporarily reduced maximum voltage, and thus represents a strong and efficient result for the Settlement Class. In light of the significant risks and complex issues in this litigation, as well as the considerable results achieved for Class Members, Plaintiff respectfully requests: (i) an award of $373,377.79 in attorneys' fees—*i.e.*, 24.9% of the common fund; (ii) reimbursement of expenses incurred in connection with this litigation, totaling $36,622.21; and (iii) a $1,000 Service Award for Class Representative David Rasmussen.

Plaintiff requests approval of attorneys' fees in the amount of 24.9% of the Settlement Fund—an amount that is "presumptively reasonable" under Ninth Circuit law. The reasonableness of the requested award is further confirmed by a lodestar "cross-check." Based on Class Counsel's total fees and expenses for the case of $426,080 as of March 25, the requested award would result in a ***negative*** multiplier of 0.88—a multiplier that will get smaller as Class Counsel works to obtain final settlement approval and, if approved, to implement the Settlement. Plaintiff and Class Counsel vigorously prosecuted this case and obtained an excellent result purely on a contingent basis and in the face of significant risks. The Settlement comes *after* Tesla released a corrective update causing gradual restoration of voltage, and in the face of disputed issues regarding class certification and damages. Were the parties to litigate, these and other difficulties would be leveraged by a well-funded corporate defendant that, predictably, retained experienced counsel and was prepared to mount a vigorous and contentious defense.

Beyond fees, the requested expenses all were critical to representation of the Class. The service award likewise is reasonable given the commitment to the Class and investment of time provided to this case by Class Representative David Rasmussen.

Plaintiff respectfully requests that the Court grant the motion.

II. BACKGROUND

A. The Alleged Conduct

Plaintiff filed suit in August 2019, and by October 2019, the parties agreed to stay the litigation in order to pursue settlement discussions. *See* Dkt. 1, 18. Although the Complaint raised multiple issues, this proposed Settlement—and the attendant release—are narrowly focused on Plaintiff's allegations that in May 2019, Tesla released an over-the-air software update that reduced the maximum voltage to which the batteries on certain Tesla Model S vehicles could be charged. Plaintiff further alleged that as a result of this voltage limitation, the maximum range of the Settlement Class Vehicles was reduced. Plaintiff alleged violations of state consumer protection statutes as well as common law claims, seeking damages and equitable relief.

B. Plaintiff's Counsel's Investigation and Informal Discovery

Prior to filing suit, and continuing through the course of informal discovery and mediation, Plaintiff's Counsel conducted an extensive investigation into the factual and legal issues raised in this litigation. These investigative efforts have included, *inter alia*, speaking with numerous Tesla drivers about their experiences, reviewing discovery from Tesla regarding the Settlement Class Vehicles and the operative software updates, and retaining and consulting a leading expert in electric vehicle batteries. Plaintiff's Counsel also researched and analyzed the legal issues regarding the claims pled and Tesla's potential defenses. *See* March 31, 2022 Decl. or Robert J. Nelson ("Nelson Decl.") filed herewith, ¶¶ 13-20; Dkt. 49-3 ("Chen Decl.") ¶ 4.

Tesla's data show that 1,743 Model S vehicles in the United States were subject to a 10% maximum voltage limitation caused by a May 2019 software update. *See* Dkt. 49-4 ("Gates Decl.") ¶ 2. A subsequent update in July 2019 restored about 3% of the battery voltage in these vehicles, and a third update released in March 2020 is designed to fully restore the batteries' voltage over time as the vehicles are driven. *Id.* ¶ 3. The restoration has proceeded as planned and, as of the date of preliminary approval, Tesla's data showed that of the 1,722 vehicles for which there was data, 1,552 had their maximum battery voltage fully restored, 79 had been restored to between 95.5% and 99%, and 34 had been restored to between 93% and 95.5%. *Id.* ¶ 4. The maximum voltage on the latter vehicles should continue to be restored over time as the

vehicles are driven. Of the remaining vehicles, 57 have had battery replacements. *Id.* Ready access to data from the final 21 vehicles is not available (not unusual for older vehicles), but the data above shows that the update works as planned and there is no reason to doubt that the voltage restoration update will work similarly in these vehicles. *Id.* ¶ 5.

In sum, Plaintiff's Counsel's investigation confirmed that the voltage limitation was temporary, with a 10% reduction lasting about 3 months, and a smaller 7% reduction lasting another 7 months before the corrective update was released in March 2020. Following that second update, the vehicles' voltage showed steady restoration over time.

C. Settlement Negotiations

The Settlement is the product of arms-length negotiations. The parties and their counsel participated in a full-day mediation with the Honorable Daniel Weinstein (ret.) and Cathy Yanni, Esq. of JAMS on July 24, 2020. After that full day, the parties reached an agreement in principle to resolve this case. Only after agreement on the substantive terms had been reached, the parties negotiated a percent-of-the-fund attorney fee request to which Tesla would not object. Since reaching an agreement in principle, the parties have worked diligently to monitor the restoration of battery voltage in the Settlement Class Vehicles, draft the written settlement agreement, notices, and other settlement exhibits, and to select the proposed Settlement Administrator through a competitive bidding process. Nelson Decl. ¶¶ 13-20; Chen Decl. ¶ 5; Gates Decl. ¶ 6.

D. The Relief Obtained for the Class

The Settlement provides for direct payments and non-monetary benefits to the Class.

First, under the Settlement, Tesla will create a Settlement Fund of $1,500,000. The entirety of the Settlement Fund, less Court-awarded attorneys' fees and expenses for Settlement Class Counsel and any service award for Plaintiff, will be distributed to the Settlement Class. This will result in a $625 payment for each Class Vehicle. Those who owned or leased the Class Vehicle over the relevant time period will receive this entire payment. For the relatively small percentage of Settlement Class Members who may have owned or leased their cars for only part of the relevant period (*i.e.*, the Class Vehicle was sold or transferred to a new lessee during this time), the $625 payment will be prorated. *See* Settlement § II.B. The Settlement Administrator's

fees and costs—*i.e.*, costs incurred in implementing the notice program, administering claims, mailing checks, and performing the other administrative tasks described in the Settlement—will be paid separately by Tesla. Settlement § II.A.4.

Second, under the Settlement, Tesla is required to maintain diagnostic software for in-warranty vehicles to notify owners and lessees of vehicles that Tesla determines may need battery service or repair for certain battery issues. *See* Settlement § II.A.2.

III. ARGUMENT

Settlement Class Counsel seek expenses in the amount of $36,622.21, attorneys' fees of $373,377.79 (24.9% of the Settlement Fund), and a Service Award of $1,000 for Class Representative David Rasmussen. As discussed below, Class Counsel's fee request is reasonable under any applicable standard, especially given the relief obtained for the Class. Similarly, Class Counsel's expenses were necessary to litigate this action, and the Service Award properly compensates the Class Representative for his role in making the Settlement possible.

A. Class Counsel's Requested Fees are Reasonable and Appropriate

In common fund cases such as this one, the guiding principle is "the equitable notion that those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). The trial court has discretion to award attorneys' fees either as a percentage of the common fund or based upon class counsel's lodestar. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019). In the Ninth Circuit, the benchmark for a reasonable fee award as a percentage of the common fund is 25%. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Courts may also cross-check a fee award by using both methods. *See Mendoza v. Hyundai Motor Co., Ltd*, No. 15-cv-01685, 2017 WL 342059, at *14 (N.D. Cal. Jan. 23, 2017) (Freeman, D.J.).[3]

[3] Where plaintiffs plead diversity jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332, and raise claims under California state law, some courts have evaluated the reasonableness of the requested fee award using California standards. *See, e.g.*, *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2013 WL 12308314, at *2 (N.D. Cal. July 22, 2013). Here, Plaintiff pleaded both federal question jurisdiction, 28 U.S.C. § 1331, and diversity under CAFA. Dkt. 1 at ¶¶ 28–30. Plaintiff's claims, moreover, arise under both Federal and California law. *See, e.g.*, *id.* ¶¶ 165–87 (pleading Federal Magnuson-Moss Warranty Act claims), ¶¶ 188–209 (pleading California Song-Beverly Consumer Warranty Act claims). Regardless of the

Here, Settlement Class Counsel seek fees just below the benchmark of 25% of the $1,500,000 Settlement Fund. This request is reasonable, particularly in light of Ninth Circuit law regarding attorneys' fees in class cases that is designed to ensure that counsel have proper incentives to take on difficult cases and pursue class members' best interests. *See Washington Pub. Power Supply*, 19 F.3d at 1299–301. Class Counsel respectfully submit that, in light of the strong results reached by Class Counsel in the Settlement, their successful work in prosecuting the claims on a pure contingency basis in this action, and the significant risks undertaken in the process, application of the benchmark percentage is eminently reasonable.

Class Counsel's fee request also is well supported by a lodestar cross-check because it represents a lodestar multiplier of 0.88 at Class Counsel's customary hourly rates, which is well within the range for such multipliers established by the Ninth Circuit. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 & n.6 (9th Cir. 2002).

1. The Request is Warranted Under the Percent-of-the-Fund Method

The Ninth Circuit's benchmark fee in a common-fund case is 25% of the fund created. *Vizcaino*, 290 F.3d at 1047. A court should depart from the benchmark only if there are "special circumstances" justifying the departure. *Bluetooth*, 654 F.3d at 942 (citations omitted). In fact, courts in the Ninth Circuit often award fees that exceed the 25% benchmark. *See, e.g.*, *Vizcaino*, 290 F.3d at 1050 (affirming 28% award); *In re Omnivision Techs., Inc*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) ("[I]n most common fund cases, the award exceeds that [25%] benchmark."); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-1365, 2010 WL 1687829, at *1–2 (N.D. Cal. Apr. 22, 2010) (granting 30% award); *Knight v. Red Door Salons, Inc.*, No. 8-1520, 2009 WL 248367, at *7 (N.D. Cal. Feb. 2, 2009) (same). Accordingly, Class Counsel's

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substantive law used to evaluate Plaintiff's fee request, however, the analysis and end result here are the same. The California Supreme Court has endorsed the percent-of-the-fund and lodestar cross-check method of determining the reasonableness of a requested fee award. *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 503–04 (2016). Further, California courts have recognized that 25% awards (and higher) are well within the range of reasonableness. *See, e.g.*, *Petersen v. CJ Am., Inc.*, No. 14-CV-2570, 2016 WL 5719823, at *1 (S.D. Cal. Sept. 30, 2016) ("California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent and has endorsed the federal benchmark of 25 percent."); *see also Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1262–63 (S.D. Cal. 2016) (same; collecting cases; evaluating reasonableness of requested fee award using parallel factors from California and federal cases).

request for 25% of the Settlement Fund is "presumptively reasonable." *Mendoza*, 2017 WL 342059, at *14.

Courts in the Ninth Circuit consider a number of factors in determining whether there is any basis to deviate from the benchmark, including: (i) the results achieved; (ii) the risks of contingency representation; (iii) the complexities of the case and skill and effort required of counsel; and (iv) awards in similar cases. *See Vizcaino*, 290 F.3d at 1048–50. These factors confirm that there is no basis here for a downward departure from the benchmark.

a. Class Counsel Achieved a Very Strong Result

The "most critical factor" in the Court's analysis is the strength of the result achieved by Class Counsel in the Settlement. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Omnivision*, 559 F. Supp. 2d at 1046; *see also* Federal Judicial Center, *Manual for Complex Litigation*, § 21.71, p. 336 (4th ed. 2004) (the "fundamental focus is the result actually achieved for class members") (quoting Fed. R. Civ. P. 23(h) committee note). The sizeable monetary relief provided to the Class in the Settlement Fund alone is sufficient to show the strength of the result achieved, especially when measured against the estimated lost value per Class Vehicle. One such estimate—based on lost kilowatt-hours, the cost of a kilowatt-hour per month, and the number of months of reduced maximum battery voltage—places the lost value around $175 per Class Vehicle. *See* Dkt. 49 at 9.[4] Under the Settlement, however, Class Members will receive $625 per Class Vehicle.

Those per-vehicle payments are strong when compared to recoveries in similar cases. In *Sheikh v. Tesla, Inc.*, Tesla purchasers received between $25 and $280—significantly less than the payment here—as compensation for failing to timely receive promised "autopilot" features. *Sheikh v. Tesla, Inc.*, No. 17-cv-2193, 2018 WL 5794532, at *5–6 (N.D. Cal. Nov. 2, 2018) (Freeman, D.J.) (finally approving settlement). And in *In re Hyundai & Kia Fuel Econ. Litig.*,

[4] As described above, the vehicles lost about 10% of maximum battery voltage for two months, and 7% of maximum battery voltage for another ten months until March 2020, when the restoration software update was released. Between March 2020 and the present, Class Vehicles' voltage was gradually restored as a function of how much they were driven and charged. To simplify the estimate and develop a best-case scenario against which to measure the Settlement, however, this damages estimate assumes the entire 7% loss was realized for a full 22 months, until March 2021.

No. 13-ml-2424 (C.D. Cal. filed Feb. 6, 2013), vehicle purchasers who filed a claim based on *Hyundai*'s alleged misrepresentation of fuel economy received between $140 and $1,420, with the vast majority receiving less than the $625 achieved here. *Hyundai*, Dkt. No. 354-1 at Page ID 6230–232; *see also* Dkt. 49 at 11.

The Settlement also requires Tesla to maintain diagnostic software for in-warranty vehicles to notify owners and lessees of vehicles that Tesla determines may need battery service or repair for certain battery issues. *See* Settlement § II.A.2. This is another source of value against which the requested fees should be measured. *Walsh v. Kindred Healthcare*, No. 11-cv-0050, 2013 WL 6623224, at *3 (N.D. Cal. Dec. 16, 2013) (approving fee request of 30% of the common fund and finding that the comparative size of the request was effectively reduced by the "substantial injunctive relief" obtained for the class through the settlement). Class Counsel respectfully submits that the Settlement's monetary and diagnostic relief together provide strong support for their fee request.

b. This Action Entailed Significant Risk

That Class Counsel obtained this recovery despite risks also supports the reasonableness of the fee request. That risk is exemplified by the uncertainties surrounding the damages incurred by Class Members: even assuming Plaintiff were to overcome all pre-trial obstacles, achieve class certification, prevail at trial, and survive any appeals, Tesla would have numerous arguments for significantly reducing the damages amount. Given the wealth of charging data at its disposal, Tesla may have been able to demonstrate that many Settlement Class Members rarely needed access to the full 100% of battery voltage given their day-to-day driving and charging habits. Moreover, Tesla released a corrective update in March 2020, such that many Class Vehicles had their voltage restored by the time of the Settlement. And at trial, Tesla likely would represent that the relevant software updates served to increase the overall life of the batteries, thereby conferring a benefit that must be offset from any potential damages. In sum, were the parties to litigate, achieving any recovery at all would be an uncertain endeavor.[5] *See*

[5] As is common in consumer class litigation, Tesla would certainly seek to parlay these damages issues into liability and injury issues that, it would argue, undermine class certification.

Omnivision, 559 F. Supp. 2d at 1046–47 ("The risk that further litigation might result in Plaintiffs not recovering at all . . . is a significant factor in the award of fees.").

c. Compensation was 100% Contingent on the Outcome

The public is served by rewarding attorneys who assume representation of their interests on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing for their work. *See Washington Pub. Power Supply*, 19 F.3d at 1299 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *Vizcaino*, 290 F.3d at 1051. Class Counsel prosecuted this case on a purely contingent basis and agreed to advance all necessary expenses, to the exclusion of other fee-generating work, knowing that they would receive a fee and be reimbursed their expenses only if they obtained meaningful relief on a class-wide basis. Nelson Decl. ¶ 21; Chen Decl. ¶ 6. In so doing, Class Counsel faced a well-funded corporate defendant who hired a preeminent, experienced law firm to mount a vigorous defense. This factor likewise supports Class Counsel's fee request. *See Hopkins v. Stryker Sales Corp.*, No. 11-cv-2786, 2013 WL 496358, at *3 (N.D. Cal. Feb. 6, 2013) (finding higher fee award justified where "[t]his case was conducted on an entirely contingent fee basis against a well-represented Defendant").

d. The Skill and Quality of Work Support the Requested Fee

The effort and skill displayed by Class Counsel, and the complexity of the issues involved, are additional factors used in determining a proper fee. *Vizcaino*, 290 F.3d at 1048; *Omnivision*, 559 F. Supp. 2d at 1046–47. Courts have recognized that the "prosecution and management of a complex national class action requires unique legal skills and abilities." *Destefano v. Zynga, Inc.*, No. 12-cv-4007, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) (quoting *Omnivision*, 559 F. Supp. 2d at 1047). As discussed above and in the attached declaration, Class Counsel thoroughly investigated and researched the factual and legal issues involved, conducted substantial informal discovery, and retained a leading expert in the field. *See* Background § II, *supra*; Nelson Decl. ¶¶ 13-20; Chen Decl. ¶¶ 4–5, 9. Indeed, the highly

technical nature of this case required extensive analysis of the technical data produced during informal discovery, as well as the software and hardware underlying the complex and technologically advanced Class Vehicles. Nelson Decl. 14-15.

The qualifications of Class Counsel are set forth in the declarations submitted concurrently and with the motion for preliminary approval. *See id.* ¶¶ 8-12 & Ex. 1 (LCHB qualifications and firm resume); Chen Decl. ¶ 3 (Chen qualifications). Where, as here, counsel are highly experienced in class action litigation, shepherded the case to a prompt resolution, have a record of success in this type of litigation, and faced high caliber opposing counsel throughout, this factor, too, "supports the fee award sought." *Destefano*, 2016 WL 537946, at *17 (citations omitted).

e. Fee Awards in Recent Common-Fund Cases Support the Requested Fees

Class Counsel's requested fees are equal to or less than the fees frequently awarded in class actions within this District and within the Ninth Circuit. *See, e.g.*, *Omnivision*, 559 F. Supp. 2d at 1047 ("[I]n most common fund cases, the award exceeds that [25%] benchmark."); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000), *as amended* (June 19, 2000) (affirming fee award of one third of common fund); *Hernandez v. Dutton Ranch Corp.*, No. 19-cv-0817, 2021 WL 5053476, at *6 (N.D. Cal. Sept. 10, 2021) (noting that "[d]istrict courts within this circuit . . . routinely award attorneys' fees that are one-third of the total settlement fund" and "[s]uch awards are routinely upheld by the Ninth Circuit"); *In re Lenovo Adware Litig.*, No. 15-md-2624, 2019 WL 1791420, *8 (N.D. Cal. Apr. 24, 2019) (awarding fees of 30% of common fund and finding "that the percentage requested is consistent with other awards in this district in comparable cases").

A review of fee awards in other recent common-fund cases involving consumer protection/privacy or commercial issues in an advanced technology setting underscores the reasonableness of the fees requested. *See, e.g.*, *Perkins v. Linkedin Corp.*, No. 13-cv-4303, 2016 WL 613255, at *14–17 (N.D. Cal. Feb. 16, 2016) (granting 25% award); *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1135–36 (N.D. Cal. 2015) (same); *In re LinkedIn*

User Privacy Litig., 309 F.R.D. 573, 590–91 (N.D. Cal. 2015) (awarding fees to class counsel in the amount of "the Ninth Circuit's established benchmark of 25%" even though "the Court disagrees that this action posed a substantial risk and required significant time and skill to obtain a result for the class"); *In re Netflix Privacy Litig.*, No. 11-cv-0379, 2013 WL 1120801, at *9–10 (N.D. Cal. Mar. 18, 2013) (approving 25% award); *Valentine v. NebuAd Inc.*, No. 08-cv-5113, 2011 WL 13244509, at *2 (N.D. Cal. Nov. 21, 2011) (approving 30% award).

Indeed, this Court recently approved a 30% award in a case involving similar claims. In *In re Nexus 6P Prod. Liab. Litig.*, No. 17-cv-2185, 2019 WL 6622842 (N.D. Cal. Nov. 12, 2019), a putative class action against smartphone manufacturers, plaintiffs asserted warranty and consumer protection claims arising from defects that caused accelerated battery drain. *See* 2019 WL 6622842, at *1 (claims for (i) breach of express and implied warranty, (ii) violation of the Magnuson-Moss Warranty Act, (iii) violation of California's Song-Beverly Consumer Warranty Act, (iv) violation of the California's Unfair Competition Law, (v) violation of California's Consumer Legal Remedies Act, and (vi) fraudulent concealment); *compare with* Dkt. 1 at ¶¶ 165–245, 305–18, 323–57, 381–92 (same). After resolution of an initial motion to dismiss, the Court finally approved a settlement with a common fund of $9.75 million, from which class members stood to receive payments ranging from $5 to $400 each. 2019 WL 6622842, at *2–3, *11. The Court also approved counsel's requested fee of 30% of the common fund, finding that the award was reasonable. *Id.* at *12–13. Respectfully, Class Counsel submit that the speedy resolution and higher (and automatic) disbursements to Class Members in this case justify a 24.9% award.

In light of the foregoing, the Court should approve Class Counsel's fee request as reasonable under the percent-of-the-fund method.

2. Class Counsel's Fee Request is Supported by a Lodestar Cross-Check

"Because the benefit to the class is easily quantified in common-fund settlements," the Ninth Circuit permits district courts "to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *Bluetooth*, 654 F.3d at 942. Thus, "the primary basis of the fee award remains the percentage method," with the lodestar used as "a cross-check on the reasonableness of a percentage figure." *Vizcaino*, 290 F.3d at 1050 &

n.5. "The lodestar cross-check calculation need entail neither mathematical precision nor bean counting and courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Nexus 6P*, 2019 WL 6622842, at *12 (cleaned up).

The lodestar is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433; *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). Class Counsel's declaration filed herewith sets out the hours of work and billing rates used to calculate the lodestar here, including a tabulation of the hours spent on various categories of activities related to this action. Nelson Decl., Ex. 2.[6] In sum, Class Counsel have devoted a total of approximately 635.9 hours to this litigation and have a total lodestar to date of approximately $426,080. *Id.* ¶ 25. That number will increase through the Final Approval Hearing and completion of settlement administration. *Id.* As such, the requested fee award results in a negative lodestar multiplier of 0.88.

The time Class Counsel dedicated to prosecuting this action is reasonable. Class Counsel were able to secure a highly favorable settlement, prosecuting the claims at issue efficiently and effectively through extensive meet and confer sessions regarding informal discovery, preparation of detailed mediation briefs, and a hard-fought mediation.

Furthermore, Class Counsel's hourly rates are reasonable. As discussed above, Class Counsel are experienced, highly regarded members of the Bar who have brought to this case extensive experience in consumer class actions and complex litigation. Nelson Decl. ¶¶ 3-12 & Ex. 1; Chen Decl. ¶ 3. The Court does not need to determine that the exact rates requested by Class Counsel are reasonable, but only that they fall within "the range of reasonableness required to use the lodestar figure as a cross check." *Moreno v. Cap. Bldg. Maint. & Cleaning Servs.*, No. 19-CV-7087, 2021 WL 4133860, at *6 (N.D. Cal. Sep. 10, 2021). Courts consider counsel's

[6] *See Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009) ("Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records."); *see also* Northern District of California, *Procedural Guidance for Class Action Settlements*, Final Approval ¶ 2 ("Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed.").

qualifications, as well as whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

Courts in the Northern District have found that similar hourly rates as those charged by Class Counsel to be appropriate. *See, e.g., Carlotti v. Asus Comput. Int'l*, No. 18-cv-3369, 2020 WL 3414653, at *5 (N.D. Cal. June 22, 2020) (collecting cases; finding that partner rates of $900 per hour, $950 per hour, and $1,025 per hour were reasonable in the Northern District of California); *Superior Consulting Servs., Inc. v. Steeves-Kiss*, No. 17-cv-6059, 2018 WL 2183295, at *5 (N.D. Cal. May 11, 2018) ("[D]istrict courts in Northern California have found that rates of $475 to $975 per hour for partners and $300 to $490 per hour for associates are reasonable."); *Gutierrez v. Wells Fargo Bank, N.A.*, No. 07-cv-5923, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (finding partner rates of $475 to $975 and associate rates of $300 to $490 reasonable for Bay Area attorneys in 2015); *see also Theodore Broomfield v. Craft Brew All., Inc.*, No. 17-cv-1027, 2020 WL 1972505, at *11 (N.D. Cal. Feb. 5, 2020) (Freeman, D.J.) (approving $600 per hour rate for sole practitioner).

Indeed, LCHB's hourly rates are paid by its sophisticated commercial clients; those rates are regularly approved by courts throughout the United States and this District. Nelson Decl. ¶ 22. *See, e.g., In re Intuit Data Litig.*, No. 15-cv-1778, 2019 WL 2166236, at *2 (N.D. Cal. May 15, 2019) (approving fees based on LCHB rates); *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-2617, 2018 WL 3960068, at *17 (N.D. Cal. Aug. 17, 2018) (same); *Campbell v. Facebook Inc.*, No. 13-cv-5996, 2017 WL 3581179, at *7 (N.D. Cal. Aug. 18, 2017) (same); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (same); *LinkedIn*, 2016 WL 613255, at *15 (N.D. Cal. Feb. 16, 2016) (approving LCHB rates and granting motion for attorneys' fees); *Wells Fargo*, 2015 WL 2438274, at *5 (same).

Finally, as noted above, the requested percent-of-the-fund award results in a negative multiplier of 0.88. This Court recently acknowledged that "[a] negative multiple 'strongly suggests the reasonableness of [a] negotiated fee.'" *Kuraica v. Dropbox, Inc.*, No. 19-cv-6348,

2021 WL 5826228, at *7 (N.D. Cal. Dec. 8, 2021) (Freeman, D.J.) (citing *Moreno*, 2021 WL 4133860, at *6); *see also Sheikh*, 2018 WL 5794532, at *8 ("Multipliers of 1 to 4 are commonly found to be appropriate in common fund cases."); *Omnivision*, 559 F. Supp. 2d at 1047 ("[C]ourts have approved multipliers ranging between 1 and 4.").

The lodestar incurred by Class Counsel thus further confirms the reasonableness of the requested fee award.

B. The Requested Reimbursement of Expenses is Reasonable and Appropriate

Class Counsel also are entitled to reimbursement of reasonable out-of-pocket costs advanced for the Class. *See* Fed. R. Civ. P. 23(h); *Paul, Johnson*, 886 F.2d at 271. Class Counsel have incurred total out-of-pocket expenses of $36,622.21. Nelson Decl. ¶¶ 24 & Ex. 3; Chen Decl. ¶ 8 & Ex. B. Significant costs included, *inter alia*, expert fees, and other customary litigation expenses. *Id.* Payment of these expenses was necessary to advance, and ultimately, to resolve this litigation. *See also In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1367–72 (N.D. Cal. 1996) (costs related to retention of experts, photocopy costs, postage, telephone costs, computerized legal research fees, and filing fees are appropriate to reimburse).

Class Counsel request reimbursement for expenses and costs in the amount of $36,622.21, which—when combined with the requested award of attorneys' fees—is the amount referenced in the Agreement and reported in the Class Notice. *See Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016) (nontaxable costs are properly awarded where authorized by the parties' agreement). These are the actual litigation expenses incurred, including filing fees, mediation fees and expenses, expert witness fees (for a leading expert in electric vehicle batteries to evaluate Plaintiff's claims and the documents and data produced by Tesla), online document databases necessary for document production and review, online legal research, and mail and postage costs. *See* Nelson Decl. ¶¶ 24 & Ex. 3; Chen Decl. ¶ 8 & Ex. B. These costs were reasonably incurred in the prosecution of the matter, and normally would be billed to and paid by the client. *Id.*

C. The Requested Service Award is Reasonable and Appropriate

Class Counsel seek a Service Award of $1,000 for Class Representative David Rasmussen. "[N]amed plaintiffs, as opposed to designated class members who are not named

plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (service awards "are fairly typical in class action cases"). Such awards are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." *Id.* "Incentive awards typically range from $2,000 to $10,000." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015).

The requested Service Award of $1,000 is reasonable and appropriate here. Class Representative David Rasmussen has been actively engaged in this matter since its inception. Nelson Decl. ¶ 26; March 31, 2022 Decl. of David Rasmussen ("Rasmussen Decl.") filed herewith. He has provided Class Counsel with detailed information about his experiences, including through data downloads obtained from his vehicle. Nelson Decl. ¶ 26; Rasmussen Decl. ¶ 5. He has communicated regularly with Class Counsel throughout the case, up to and including evaluation and approval of the proposed Settlement. Nelson Decl. ¶ 26; Rasmussen Decl. ¶¶ 4-7. Because he came forward to assert rights that are common to all Class members, Tesla has committed to pay a total $1,500,000. Accordingly, he should be rewarded for the "public service of contributing to the enforcement of mandatory laws." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011).

Finally, the requested award is appropriate when compared to the recovery achieved. In assessing the reasonableness of a requested service award, courts may compare the request against the size of the settlement fund and/or the size of the disbursements that individual Class Members will receive. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947–48 (9th Cir. 2015) (upholding $5,000 incentive awards after comparing to individual class member recoveries of $12 and $27.25 million settlement fund). Here, the proposed service award is only 1.6 times the amount of Class Members will receive. This is well within the range of reasonable proportions approved in this District. *Compare, e.g.*, *Wren v. RGIS Inventory Specialists*, No. 06-cv-5778, 2011 WL 1230826, at *31–37 (N.D. Cal. Apr. 1, 2011) (approving $5,000 service awards to 20 named plaintiffs where "average award to class members [was] $207.69").

Plaintiff's request is likewise is reasonable when compared to the Settlement Fund as a

whole: it represents only 0.066% of the Fund. *Compare, e.g.*, *Mego*, 213 F.3d at 457 (approving incentive awards of $5,000 each to two class representatives in $1.725 million settlement, which collectively comprised 0.56% of total settlement); *In re: High-tech Emp. Antitrust Litig.*, No. 11-cv-2509, 2014 WL 10520478, at *3 (N.D. Cal. May 16, 2014) (approving "modest" service awards that represented 0.4% of recovery); *Anthem*, 2018 WL 3960068, at *31 (collecting cases; approving service awards that represented 0.52% of recovery); *Rhom v. Thumbtack, Inc.*, No. 16-cv-2008, 2017 WL 4642409, at *8 (N.D. Cal. Oct. 17, 2017) ("A $5,000 award also equals approximately 1–2% of the total settlement fund, which is consistent with other court-approved enhancements.").

In light of the total value of Settlement proceeds and the Class Representative's service in this case, the proposed service award is reasonable.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant this motion in its entirety, and award (i) attorneys' fees to Class Counsel in the amount of $373,377.79; (ii) reimbursement of litigation expenses of $36,622.21; and (iii) a service award of $1,000 to Class Representative David Rasmussen.

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Respectfully submitted,

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